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June 3, 2014

Received & inspected

JUN 04 2014

FCC Mail Room

**FEDERAL EXPRESS**  
Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth St., SW  
Room TW-A325  
Washington DC 20554

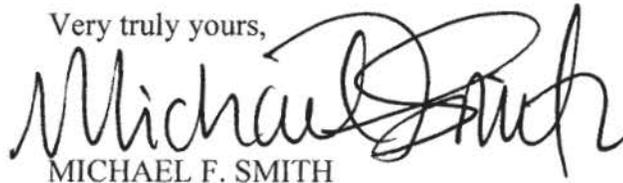
Re: **Petition for Expedited Declaratory Ruling and Clarifications**  
**CG Docket No. 02-278**

Dear Ms. Dortch:

On behalf of Stage Stores, Inc., enclosed for filing is an original and four (4) copies of a Petition for Expedited Declaratory Ruling.

Please date-stamp the enclosed extra copy of this filing and return it in the self-addressed, stamped envelope provided. Please direct any questions regarding this filing to the undersigned.

Very truly yours,

  
MICHAEL F. SMITH

MFS:jiw  
Enclosures

No. of Copies rec'd 0+4  
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Before the  
Federal Communications Commission  
Washington, DC 20554

Received & Inspected

JUN 04 2014

FCC Mail Room

In the Matter of )  
 )  
Stage Stores, Inc. Petition for Expedited ) CG Docket No. \_\_\_\_\_  
Declaratory Ruling Regarding Reassigned )  
Wireless Telephone Numbers )  
 )  
Rules and Regulations Implementing the ) CG Docket No. 02-278  
Telephone Consumer Protection Act of 1991 )

**PETITION FOR EXPEDITED DECLARATORY RULING**

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June 3, 2014

## I. INTRODUCTION AND SUMMARY

Stage Stores, Inc. (“Stage Stores”),<sup>1</sup> pursuant to Section 1.2 of the Federal Communications Commission’s (“Commission”) rules,<sup>2</sup> respectfully submits this Petition for Expedited Declaratory Ruling (“Petition”) to clarify the applicability of the Telephone Consumer Protection Act (“TCPA”)<sup>3</sup> and the Commission’s TCPA rules to a marketing text message sent to a wireless number for which the caller obtained prior express consent but where the wireless number has been reassigned from the consenting consumer to another person without notice or knowledge to the caller.

Stage Stores recognizes that its Petition seeking resolution of controversy or uncertainty surrounding TCPA liability for calls to reassigned numbers is similar to the issues raised in the Petition for Expedited Declaratory Ruling recently filed with the Commission by United Healthcare Services, Inc.,<sup>4</sup> and those raised in the Comments, Or, In The Alternative, Petition for Declaratory Ruling recently filed with the Commission by Comcast Corporation.<sup>5</sup> Stage Stores supports and adopts as its own the arguments in those submissions, and any others seeking relief regarding calls to reassigned numbers, as well as comments submitted in favor of those

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<sup>1</sup> Stage Stores is a Houston, Texas-based retailer which operates its stores under the Bealls, Goody’s, Palais Royal, Peebles, and Stage nameplates. Stage Stores offers moderately priced, nationally recognized brand name and private label apparel, accessories, cosmetics and footwear for the entire family. Stage Stores operates more than 850 stores in the United States. Stage Stores’ principal focus is on consumers in small and mid-sized markets which are under-served. Stage Stores differentiates itself from the competition in the small and mid-sized communities that it serves by offering consumers access to basic, as well as fashionable, brand name merchandise not typically carried by other retailers in the same market area.

<sup>2</sup> 47 C.F.R. § 1.2.

<sup>3</sup> 47 U.S.C. § 227 *et seq.*

<sup>4</sup> See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 United Healthcare Services, Inc.*, Petition for Expedited Declaratory Ruling submitted by United Healthcare Services, Inc., CG Docket No. 02-278 (filed Jan. 16, 2014).

<sup>5</sup> See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 United Healthcare Services, Inc.* Comments, Or, In The Alternative, Petition for Declaratory Ruling submitted by Comcast Corporation, CG Docket No. 02-278 (filed March 11, 2014).

submissions. Resolution of the controversy and uncertainty surrounding TCPA liability for reassigned numbers is necessary to disincentivize frivolous putative class action litigation against companies which exercise good faith in complying with the TCPA. Without the Commission's regulatory guidance in today's litigious climate, companies that exercise best practices and comply with the TCPA can still be dragged into nationwide putative class action litigation for calls to wireless numbers even though the caller obtained prior express consent. Congress surely did not envision imposing exorbitant TCPA class action liability on callers under these limited circumstances.

## **II. STAGE STORES' MARKETING CALLS TO WIRELESS NUMBERS**

Stage Stores complies with the TCPA's prior express consent provisions.<sup>6</sup> Prior to sending any marketing text messages to a consumer's wireless number, Stage Stores utilizes a double-opt in procedure to obtain that consumer's express written consent. Under Stage Stores' double-opt in procedure, (1) a person enters their wireless number and by checking a box verifies that they consent to receiving marketing text messages to that wireless number, and then (2) once the first text message is sent to that number, that person must again consent to receiving marketing text messages by responding to that initial text message by entering and sending, for example, the word "STORE." Only after both steps in the double opt-in procedure have been completed does Stage Stores send marketing text messages to a consumer's wireless number. Stage Stores' marketing text messages do not violate the TCPA.

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<sup>6</sup> Stage Stores recognizes that this Commission's rules, which became effective October 16, 2013, require callers to obtain prior express written consent before making marketing calls to wireless numbers. *See* 47 C.F.R. § 64.1200(a)(2). Stage Stores obtains prior express written consent prior to making marketing calls, and sending marketing text messages, to wireless numbers.

Further, each marketing text message ends with the instruction, “Text STOP 2stop.” Thus, any consumer who has a new wireless number, for which prior express consent has been given, can easily revoke consent and immediately stop all future marketing text messages from Stage Stores.

### III. EVER INCREASING TCPA LITIGATION

The plaintiffs’ bar is pushing the envelope by attempting to create TCPA liability beyond what Congress intended. The plaintiffs’ bar suggests that a caller should be subject to exorbitant TCPA class action liability for sending marketing text messages to a wireless number where the consumer gave prior express consent to receiving marketing text messages, but then that wireless number is reassigned to another person without notice to the caller.

It is estimated that almost 37 million phone numbers get recycled, *i.e.*, reassigned, each year.<sup>7</sup> That means that on average more than 101,000 numbers are recycled every single day of the year. There are no comprehensive public wireless number directories that can be accessed by callers to timely, efficiently, or reliably verify whether or not a wireless number is one of the hundreds of thousands of numbers that get reassigned on a weekly basis.

It is indisputable that TCPA litigation is on the rise. However, a recent study by the United States Chamber of Commerce found that, even as the number of TCPA lawsuits has soared in recent years, “[i]t is rare these days to see TCPA litigation brought against its original intended target—abusive telemarketers.”<sup>8</sup> Despite having best practices in place and making every effort to comply with TCPA’s prior express consent requirement, marketers will

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<sup>7</sup> Alyssa Abkowitz, *Wrong Number? Blame Companies’ Recycling*, WALL ST. J., (Dec. 1, 2011).

<sup>8</sup> See U.S. Chamber of Commerce, Institute for Legal Reform, *The Juggernaut of TCPA Litigation: Problems with Uncapped Statutory Damages*, at 1 (Oct. 1, 2013), available at <http://www.instituteforlegalreform.com/resource/the-juggernaut-of-tcpa-litigation-the-problems-with-uncapped-statutory-damages/>.

innocently send text messages to wireless numbers that have been reassigned. The fact that an inadvertent error can give rise to the filing of a TCPA putative nationwide class action lawsuit, with its concomitant bet-the-company exposure, demonstrates how TCPA litigation has ballooned into a cottage industry for plaintiffs' lawyers and has become an impediment to providing consumer-requested marketing text messages to wireless numbers.

#### **IV. THE RELIEF REQUESTED BY STAGE STORES**

Stage Stores submits there should be an exception to liability under the TCPA for autodialed marketing calls, including text messages, made to reassigned wireless numbers where the caller had obtained prior express consent to make such marketing calls, but the wireless number has been reassigned without notice to the caller, provided the caller updates its records and ceases calls to that wireless number within a reasonable time period after being informed that the number has been reassigned. The Commission has authority to "issue a declaratory ruling terminating a controversy or removing uncertainty."<sup>9</sup> This clarification would comport with the FCC's recognition of the challenges related to companies' identifying when a wireless number's status has changed, and would be consistent with the FCC's existing TCPA safe harbor for calling numbers that have been recently ported from wireline to wireless service.<sup>10</sup> The clarification is "necessary to allow callers to come into compliance with the rules."<sup>11</sup> In light of the controversy, uncertainty, and inequity surrounding TCPA liability for calls to reassigned numbers, granting the declaratory ruling requested is within this Commission's authority.

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<sup>9</sup> 47 C.F.R. § 1.2.

<sup>10</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 (2004) ("2004 TCPA Order") at ¶¶ 7-13 (describing the "reasonable opportunity" afforded callers to identify wireless numbers under the Commission's safe harbor for calling numbers recently ported from wireline to wireless service).

<sup>11</sup> See 2004 TCPA Order at ¶ 9.

This Commission has already articulated limited exceptions to TCPA liability to “ensure that callers have a reasonable opportunity to comply with [TCPA] rules while continuing to protect consumer privacy interests,” especially where “the statute would demand the impossible” of callers.<sup>12</sup> Without the requested clarification, callers who have obtained prior express consent to make marketing calls or send marketing text messages using automated dialers would have to manually call the number prior to making automated calls to verify that the person who gave prior express consent still owns that wireless number or face the risk of a putative nationwide class action lawsuit by a person who just received a reassigned number. That scenario is not workable and demands the impossible of callers. In order to provide callers with a reasonable opportunity to comply with the TCPA and this Commission’s rules applicable to marketing calls to wireless numbers, the Commission should issue a declaration that TCPA liability does not attach to marketing calls or text messages to reassigned wireless numbers for which the caller has obtained prior express consent until a reasonable time after the caller has been made aware that the wireless number has been reassigned.

## V. CONCLUSION

Stage Stores recognizes and supports the important privacy and consumer protection goals behind the TCPA, and continuously endeavors to comply with the TCPA and this Commission’s regulations enforcing the TCPA. Despite good faith efforts to comply with TCPA’s prior express consent requirements—and even going beyond the minimum requirements—Stage Stores is still named as the target defendant in a TCPA putative nationwide class action where the Plaintiff alleges the amount in controversy exceeds \$5,000,000, the

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<sup>12</sup> See 2004 TCPA Order at ¶¶ 1, 9 (internal quotation marks and citations omitted).

threshold for federal court jurisdiction under the Class Action Fairness Act.<sup>13</sup> While Stage Stores is not suggesting the Commission should limit the ability of consumers to hold bad actors accountable for illegal calls and text messages, the Commission should grant the requested relief to reduce the onslaught of frivolous class action litigation initiated against companies that act in good faith to comply with the TCPA and this Commission's rules. Clarifying that TCPA liability does attach in the reassigned number scenario, when the caller has acted in good faith to comply with the TCPA, will not undermine and is consistent with Congress' intent in enacting the TCPA.

Respectfully submitted,

/s/ N. Martin Stringer

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Counsel for Stage Stores, Inc.

June 3, 2014

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<sup>13</sup> See *Anthony Freeman, on behalf of himself and all others similarly situated, Plaintiff, v. Specialty Retailers, Inc., a Texas Corporation d/b/a "GOODY's"; Stage Stores, Inc., a Texas Corporation; Soundbite Communications, Inc., a Delaware Corporation; and Velti, Inc., Defendants*, Case No. 14-cv-664-APG-GWF (S.D. Nevada).